IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-628

TEXAS PETROLEUM COMPANY,

Petitioner,

v.

COMPANIA PELINEON DE NAVEGACION, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Texas Petroleum Company, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, not officially reported, which reversed in part, and affirmed in part, the District Court (SDNY), is set forth in the Appendix hereto (A1).

The opinion and findings of fact and conclusions of law of the District Court (Boldt D.J.—Senior Judge of the

Western District of Washington, sitting by designation), not officially reported, is set forth in the Appendix hereto (A11, A20).

Jurisdiction

The judgment sought to be reviewed is dated August 6, 1976 and was entered of record on August 6, 1976 (A9).

This being a civil case in admiralty, District Court jurisdiction was founded upon 28 USC § 1333(1).

The statutory provisions that confer jurisdiction upon this Court to review the judgment in question are 28 USC § 1254(1) and 28 USC § 2101(c).

Questions Presented

(I) Whether, under the General Maritime Law of the United States, a vessel owner, in addition to recovering for loss of use or lost profit from a tortfeasor, measured by the rate of the vessel's long term time charter, for the time when the vessel is off-hire and delayed for inspection immediately after an allision, and for the time when the vessel is off-hire much later while under repair, is also entitled to any additional recovery for alleged loss of use or lost profit for any part of the still much later extension period of the time charter, when the vessel is operating and being paid its agreed time charter hire during the extension, which extension is caused or comes into being by the time charterer eventually exercising an option to extend the charter term by off-hire experienced during the long term time charter; and whether any such additional alleged lost profit, under the General Maritime Law of the United States, is proximately caused by the allision, when:

(a) a recovery for such additional alleged lost profits has never before been awarded;

(b) previous District Court and Court of Appeals decisions have only permitted the recovery of the time charter hire lost (less expenses saved) by a vessel owner for the time when a vessel is delayed or under repair and off-hire while still under a preexisting time charter;

(c) the alleged additional lost profit (measured by the alleged difference between the time charter rate and the market rate during the extension period) is exactly the prospective pecuniary interest or economic advantage or additional profit determined to be unrecoverable in *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927);

(d) the United States Court of Appeals for the Second Circuit, in the very litigation relied upon and cited in reversing the District Court's denial of any additional lost profit herein, held that a tortfeasor was not liable for the additional cost, damage or loss sustained by reason of a claimant being required to fulfill a contract made more costly to complete by reason of the tort, on the ground that such damage was too remote or indirect to be recoverable in a tort action—but failed to apply the same test or rationale herein;

(e) The tortfeasor herein was a third party unrelated to the charter party between the vessel owner and charterer;

(f) Six months passed between the allision and the repair period, another 3 months passed between the repair period and the exercise of options by the charterer, and another 4 months passed between the exercise of the options and that part of the extension period for which alleged lost additional profit was sought;

(g) no charter to follow or succeed the time charter was entered into by the vessel owner until about one week prior to the end of the extension period of the time charter;

(h) the market conditions between April 1973 (the repair period) and October 1973 (the extension period) "soared", according to the Court of Appeals (A3), and were "unprecedented" according to the vessel owner and the District Court (A30);

(i) other off-hire periods, totally unrelated to the allision, took place before and after the allision, and before and after the repair period, and were the bases for a portion of the extension period, and effected when the vessel would come off the time charter, and what part of the extension period was allegedly "caused" by the allision;

(j) the amount of off-hire to be added to the time charter period, by virtue of the charterer exercising its option, was a matter to be evaluated and presented by the charterer, and considered and evaluated by the vessel owner, with differences negotiated out between the two;

(k) the Arab/Israeli war of October 6, 1973 took place during the extension period (but before the period for which additional lost profit was claimed) which was shortly followed by chaos in the charter market, great fluctuations in rates from day to day and within any single day, and as the District Court stated, "market conditions prevailing during the claimed damage period were very extraordinary and uncertain . . .", which the Court of Appeals could not and did not take issue with (A17);

(l) the rule created herein by the Court of Appeals means that whenever a casualty is sustained (by

reason of a tort of a third party) by any of the countless ships operating under long term time charters (which are often for three or five or ten or twenty years), damages cannot be evaluated, calculated or ascertained until the end of the charter period to see whether and how charterers exercise options in charter agreements;

(m) the rule created herein by the Court of Appeals will result in United States Courts being obliged to follow the subsequent chartering or economic history of the vessels *ad infinitum* to see if the allision and/or exercise of options and/or extension periods result in some economic gain or loss; and/or United States Courts will be the arena for endless disputes and arguments to pick some unpredictable and arbitrary point in a ship's post casualty history beyond which they should or will not look for economic loss or gain "caused" by the casualty; and

(n) the rule created herein by the Court of Appeals is directly contrary to the law of England; will increase international forum shopping in connection with maritime controversies and casualties; and will result in significant additional congestion in United States Admiralty Courts?

(II) When a District Court has denied any recovery for alleged additional lost profit on grounds that: (1) any such damage was unforeseeable and remote, (2) the amount of any such damage was not proven with the reasonable certainty required by law, and (3) the demeanor and the lack of credibility of the claimant's *only* witness on loss of profit —may a Court of Appeals reverse on the sole ground that it saw the damage as foreseeable and not too remote, and disregard (a) the failure of the claimant to sustain its burden of proof on damages, and (b) the District Court's stated findings on credibility?

Statement of the Case

This suit was brought by respondent, Compania Pelineon de Navegacion, S.A., as owner of the tanker CAPETAN MATHIOS (hereinafter referred to as "the ship") against petitioner, Texas Petroleum Company (hereinafter referred to as "Texpet") to recover physical damage and loss of use or lost profit. The ship was damaged as the vessel was being maneuvered and navigated by a pilot employed by Texpet into a sea berth operated by Texpet at Tumaco, Colombia, in September 1972. The propeller and propeller shaft of the ship came into contact with a chain of one of the mooring buoys.

From January 18, 1970 to November 25, 1973, the ship was operating under a long term time charter to Gulf Oil Corporation (Gulf). The charter party (agreement) entered into on September 19, 1969 was for "eighteen months, fourteen (14) days more or less at Charterer's option", and was extended for an additional ". . . two years, one month more or less, at Charterer's option" by addendum to the charter party dated May 28, 1971. The charter party also provided that the charterers (Gulf) could exercise an option (no later than 30 days prior to the end of the charter) to extend the charter party for any off-hire periods that took place during the three and one half year time charter.

The casualty at Tumaco occurred on September 29, 1972. After a two day delay to examine damages at Tumaco, the vessel was found seaworthy, and continued operating in a normal fashion under the time charter. At a time and place mutually convenient to the ship and Gulf, owner's repairs and allision repairs were made in the United States in March/April 1973 during a total of 22.953 days. After the repair period, the vessel again continued operating under the time charter. On June 28, 1973 Gulf exercised all options to extend the charter, including extending for all off-hire periods during the three and one half year charter. After some negotiation, the ship and Gulf ultimately agreed that all such off-hire amounted to 64 days 17 hours and 58 minutes, and the time charter period was extended to 0016 hours November 27, 1973.

Between April and October 1973, the charter market for tankers took an unprecedented rise. Shortly after the Arab/Israeli war of early October 1973, the market went into turmoil and took a radical drop.

The ship and Texpet settled the liability issue herein under terms of the ship being entitled to recover 80% of its provable damage. The ship and Texpet then also settled the question of the quantum of provable damage sustained by the ship for hull and engine damage, and Texpet long ago paid the ship $180,090.00 for same under the settlement. Thus, the remaining issue, which was tried below, was how much the ship was entitled to recover for loss of use or lost profit.

The ship claimed that its provable damage for loss of use was in the amount of $97,077.26, i.e. the lost time charter hire not paid by Gulf for the 2.226 day delay at Tumaco in September/October 1972 and the 22.953 day repair period in March/April 1973 (a total of 25.179 days). The ship also claimed that its provable damage included additional alleged lost profit in the amount of $303,297.05, representing the difference between the profit the ship made during the last 25.179 days of the *time charter* with Gulf in November 1973, and the profit that the ship could have allegedly made by operating under two assumed but uncontracted for *voyage* charters, starting at assumed dates, carrying assumed quantities of cargo, between assumed ports, at assumed base freight rates, under assumed *voyage charter* World Scale rates.

The District Court held that the ship's provable damage for loss of use or lost profit was in the amount of $81,681.49, measured by the time charter rate in the charter party between the ship and Gulf (less expenses saved), for the 2.226 day delay at Tumaco, and 18.953 days of the 22.953 day repair period of the vessel.

The District Court also awarded the ship interest on the above award, with each side bearing its own costs.

The District Court denied any recovery for any alleged lost profit during any part of the extension period of the time charter because:

(a) no such recovery had ever before been awarded (A16);

(b) to allow any such recovery would have been inequitable (A16, A17)

(c) any such recovery would "in effect" result in Texpet paying twice for a single wrong, i.e. give the ship (1) the economic gain or advantage the ship was entitled to under the time charter, plus (2) the prospective but speculative economic advantage or gain represented by the difference between the time charter hire the vessel owner was receiving during the extension, and charter rates in the open market during the extension period, which prospective potential loss the ship had opened itself up to by reason of agreeing to off-hire extension options in the charter party (A16);

(d) any such alleged additional lost profit was too remote, unforeseeable and speculative to be recoverable as consequential damages in the instant tort action (A16, A18, A29, A30, A31)

(e) the amount of any such additional lost profit had not been established ". . . with the reasonable certainty required in a case where a party is seeking a recovery for lost profit", and had ". . . not been established with reasonable or any certainty by the evidence." (A17, A29); and

(f) the ship's claim and calculations for additional lost profit was based upon the testimony of a single witness who was not believed, and whose credibility was adversely and pointedly commented upon by the District Court. (A12)

The Court of Appeals affirmed the denial of any recovery for loss of use for 4 days of the ship's repair period in March/April 1973; reversed the District Court's denial of costs to the ship because the District Court did not state the reason for said denial; and reversed the District Court's denial of any award for lost profit during the extension period, remanding the case for further proceedings and computations on the alleged additional profit, and cost questions.

The Court of Appeals reversed on the additional alleged lost profit issue because:

(a) citing its own language in *Petition of Kinsman Transit Company,* 338 F.2d 708, 724 (2d Cir. 1964) *cert. denied sub. nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965):

> "[t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct', and the damage, although other and greater than expectable, is of the same general sort that was risked."; (A5)

(b) the Court considered it foreseeable (not known) that the ship would be under a time charter, the time charter would have an optional off-hire extension clause in it, the market would rise, and the charterer would exercise all its options; and (A6)

(c) the Court considered any such alleged additional lost profit in October/November 1973 to be not too indirect or remote a consequence of the casualty of September 1972 (by either time, or options, or events) to be recoverable. (A6)

Reasons for Granting the Writ

A Writ of Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has erroneously rendered a decision involving important questions of Federal and General Maritime Law, and Federal appellate procedures and standards, and has ". . . so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this court's power of supervision". U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

I

The decision of the Court of Appeals establishes a right of recovery for lost profits never before awarded, and in excess of previous loss of profit awards of District Courts and Courts of Appeal which awarded damages for loss of use in the amount of time charter hire (less expenses saved) lost during repair or off-hire periods attributable to casualties.

Prior to the decision of the Court of Appeals herein it was clear that when a vessel is operating under a long term time charter, and goes off-hire during a delay or repair period by reason of a casualty caused by a third party, the proper measure of the loss of use, lost profit, or lost charter hire the ship is entitled to recover, is the charter rate in the existing time charter, less expenses saved during the delay or repair period.

The El Monte, 252 Fed. 59, 64 (5th Cir. 1918) cert. den. 248 U.S. 573 (1918);
Sabine Transportation Co. v. *S.S. Esso Utica,* 1955 A.M.C. 2102, 2106 (E.D. Texas 1955);
The Agwidale, 61 F. Supp. 191 (S.D.N.Y. 1945), aff'd 153 F.2d 869 (2d Cir. 1946), cert den. 328 U.S. 835 (1946);
Quevilly-Sampson, 1938 A.M.C. 347 (S.D.N.Y.);
The Belgenland, 36 Fed. 504, 505, 506 (S.D.N.Y. 1888).

The District Court herein awarded the ship a recovery for lost profits and loss of use in accordance with the above authorities. There is no reason in law, or equity, or common sense, to award more to the ship.

II

The decision of the Court of Appeals permits a recovery for prospective economic gain or alleged lost profit which was held to be unrecoverable by this Court in *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927).

In *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927), it was determined that the time charterer of a vessel could not make any recovery for any alleged additional lost profit measured by the difference between the time charter rate and what the vessel might have been worth on the open market during a repair or off-hire period for which the tortfeasor was responsible, when the tortfeasor had already made good for the time charter hire lost by the vessel owner during the repair or off-hire period. Such alleged additional lost profit, or alleged difference between the time charter rate and open market rate, is exactly what the Second Circuit has stated the ship is entitled to herein.

The fact that the ship took upon itself, by contract, the risk of a charterer exercising extension options, and the prospective pecuniary loss that was the charterer's in *Robins Dry Dock & Repair Co.* v. *Flint* (*supra*), does not mean that the United States maritime law of damages should extend its protection or recognition to any such secondary or prospective theoretical loss.

III

The decision of the Court of Appeals is contrary to the holding and rationale of its own decision in *Petition of Kinsman Transit Company,* 388 F.2d 821 (2d Cir. 1968) on what damage is too indirect or remote and/or not proximately caused by a tort; presumes to establish a United States martime law rule on the lack of any requirement of foreseeability of damage in tort; and extends the concept of proximate cause in martime cases and controversies, which should be considered, defined and spoken to by this Court.

In discussing the application of the *Kinsman* litigation ("Buffalo Bridge Cases" as they are commonly called), the Court of Appeals stated:

> "In *Petition of Kinsman Transit Company,* 338 F. 2d 708, 724 (2d Cir. 1974), *cert. denied sub. nom. Continental Grain Co.* v. *City of Buffalo,* 38[0] U.S. 944 (1965), this Court observed that
>
> '[t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct", and the damage, although other and greater than expectable, is of the same general sort that was risked.'" (A5)

However, the *Kinsman* litigation continued, resulting in the later decision of *Petition of Kinsman Transit Company,* 388 F. 2d 821 (2d Cir. 1968) (*Kinsman II*). This later decision went to the question of whether two specific items of claimed damage were recoverable, based upon the Second Circuit's earlier decision on liability. The two items of damage involved were:

1) The claim by an owner of cargo stored on a vessel moored in the river, for the extra cost of getting

other cargo delivered to a purchaser in a timely fashion, pursuant to its contractual obligation with the purchaser. The cargo intended for the purchaser, but stored on a vessel in the Buffalo River, could not be moved or delivered because of the tortious blockage of the river; and

2) The extra cost of unloading cargo incurred by a vessel that was moored on the river. The vessel was moved away from her unloading berth, and could not return to same, by reason of being struck by one of the drifting ships. The vessel owner was obligated to deliver the cargo, pursuant to contractual obligations with cargo interests.

The Second Circuit, rather than decide the case on grounds dealing with the scope of liability for negligent interferences with contract, considered the issue to be—what damage was recoverable from the tortfeasors in terms of foreseeability, directness, remoteness, legal cause and proximate cause. The Court denied any recovery for the above extra expenses or losses which resulted from the claimants being required to fulfill existing contractual obligations. The Second Circuit affirmed the District Court's denial of said damages:

> ". . . recovery was properly denied on the facts of this case because the injuries to Cargill and Cargo Carriers were too 'remote' or 'indirect' a consequence of defendants' negligence.
>
> Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damage caused 'in fact' by his negligence. See Prosser, supra, 282-329; 2 Harper and James, supra, 1132-61; Hart and Honore, Causation in the Law, chs. VI and IX (1959). Such limiting principles must exist in any system of jurisprudence for cause and effect succeed one another

with the same certainty that night follows day and the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time. In Anglo-American law, as Edgerton has noted, '[e]xcept only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result so much as its foreseeability' Legal Cause, 72 U. Pa. L.Rev. 211, 352 (1924). E.g., Brady v. Southern Railway Co., 320 U.S. 476, 483, 64 S.Ct. 232, 88 L.Ed. 239 (1946).

On previous appeal we stated aptly 'somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.' 338 F.2d at 725. We believe that this point has been reached with the Cargill and Cargo Carriers claims." (pp. 824, 825)

A critical factor in denying any recovery for the damages claimed in *Kinsman II* was the point that they arose by reason of an existing contractual obligation of the claimants, and were remote and indirect, in terms of time and space, from the casualty itself. They were not caused by the force that gave rise to the requirement that the defendants were to exercise care. They were caused by the common contractual terms which cargo and vessel interests were already bound by in the event that a tort of a third party interferred with the normal operations of the ships in question.

Under the facts of this case, any alleged lost profit during the extension period was too remote, too tenuous, too indirect, too unforeseeable, and too speculative to be recoverable in this tort action, under the General Maritime Law of the U.S. and/or *Kinsman II.*

Moreover, the District Court was certainly not "clearly erroneous" in finding the unforeseeability, remoteness, and

speculation it did with respect to this item of damage.* There were numerous factors and forces that acted and/or came into being during the period of over a year between the casualty and the extension period. There was the existence of the several options in the time charter to begin with; the various off-hire periods; the evaluation of what off-hire should be claimed and/or accepted; and negotiation of the off-hire periods; the exercise of the options; the Arab-Israeli war of October 6, 1973; the oil embargo and/or cutback in production; the unprecedented rise in the charter market; and the extraordinary instability of market conditions during the extension period, to mention but a few. Under these circumstances, the casualty of September 1972 should not be held to be the "legal" or "proximate cause" of any alleged lost profit during the extension period in November 1973, under the Federal or Maritime law of proximate cause. See generally: *Harper & James, The Law of Torts,* Vol. 2, 1956, Chap. XX, pp. 1108-1161, and in particular pp. 1141-1143; and *Prosser, Law of Torts,* 1971, Chap. 7, pp. 236-290, and in particular pp. 250, 252, 253, 263-267, 270-272, and authorities cited therein.

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* The District Court's findings on damages, and the issues of proximate cause, should have been governed by the "clearly erroneous" test of F.R.C.P. 52(a):

McAllister v. *U.S.*, 348 U.S. 19, 22, 23 (1954);
Neal v. *Saga Shipping Co., S.A.*, 407 F.2d 481, 489 (5th Cir. 1969), cert. den. 395 U.S. 986 (1968);
U.S. v. *Ebinger,* 386 F.2d 557, 560 (2d Cir. 1967).

It is obvious that the Court of Appeals disagreed with the District Court on the foreseeability and remoteness questions, but there is not one word from the Second Circuit as to why the District Court was "clearly erroneous" on these points. Certainly, if appellate review or reversal standards are to be more than empty phrases, affirmance should follow where the question is a fine one, reasonable men (judges) could differ, and the "clearly erroneous" test is applicable.

IV

The rule established by the decision of the Court of Appeals makes it impossible to calculate and/or determine damages for years in many cases and controversies involving time charters; makes endless argument inevitable and outcomes unpredictable and uncertain as to how far the law and courts will look into the subsequent history of a vessel for economic gain or loss "caused" by a casualty; and will encourage and cause substantial international forum shopping and additional litigation in United States admirality courts.

The Court of Appeals decision makes it impossible to determine damages for loss of use until a vessel under a long term time charter has completed its time charter. Such a rule is unworkable and impractical. The Court of Appeals decision also opens up all sorts of possible arguments and judicial inquiries on how maritime casualties, repair periods, exercise of options, and extension periods, have ultimately effected the future service or profit or loss of the shipowner in the subsequent economic life of a particular ship. This is precisely why all seven members of the bench in England who judged and considered the case of *The Soya,* 1956, 1 Lloyd's List Law Reports 557 (Court of Appeals) through its several levels of litigation, would not open the door to the speculation and endless disputes and claims for additional lost profits which the Court of Appeals has now done for the General Maritime Law of the United States. Thus, the English Courts, held that the alleged additional lost profits were

> "too speculative and too remote to be taken into consideration as a consequence by law of the detention in respect of which this claim arises." (p. 566)

The decision of the Second Circuit is in direct conflict with the decision of the Englsh admiralty courts in *The*

Soya, (supra) which had the same issue for decision. Since United States federal courts and English admiralty courts are the major arenas for the determination of maritime controversies, it is certain that the Court of Appeals decision, if permitted to stand, will encourage international forum shopping, and will bring to these shores and our Courts substantial additional suits and court congestion involving ship claims where the vessels involved are damaged while operating under long term time charters. The repercussions of the Circuit Court's decision in the above respects are already being felt.

V

The decision of the Court of Appeals, in violation of established federal appellate procedures and standards, disregarded the District Court's denial of any recovery for additional lost profit on the separate grounds that (1) the amount of any such alleged damage was not proven with the reasonable certainty required and (2) the lack of credibility of the vessel owner's only witness on loss of use and lost profits. Affirmance was required on these separate grounds.

Under proper appellate procedure, affirmance is required by a Court of Appeals if any one of several grounds relied upon by a District Court, each of which is sufficient by itself to support the judgment below, is well founded, or solely within the province of the District Court, and is not reversed.

> *Dandridge* v. *Williams,* 397 U.S. 471, 475, 476 (1970);
> *Jaffke* v. *Dunham,* 352 U.S. 280 (1957);
> *Carpenters Dist. Coun. of Denver & Vic.* v. *Brady Corp.,* 513 F.2d 1, 4 (10th Cir. 1975);
> *U.S.* v. *Finn,* 502 F.2d 938, 940 (7th Cir. 1974);
> *Pound* v. *Insurance Company of North America,* 439 F.2d 1059, 1062 (10th Cir. 1971);

Potter v. *La Munyon,* 389 F.2d 874 (10th Cir. 1968);
American President Lines, Ltd. v. *Towboat, Seneca,* 384 F.2d 511, 514 (2d Cir. 1967);
Corriyan v. *California State Legislature,* 263 F.2d 560, 565 (9th Cir. 1959);
Nuttall v. *Reading Company,* 235 F.2d 546, 548 (3rd Cir. 1956).

In addition to holding that the ship could not recover additional alleged lost profits on the ground that same were too remote and unforeseeable, the District Court denied any such recovery on the separate ground that the amount of damage was not established ". . . with reasonable or any certainty by the evidence." (A14, A15, A17). The District Court stated quite correctly that damages must be established with "reasonable certainty", and "It is necessary to show that profits '. . . have actually been or may be reasonably supposed to have been lost . . .'", citing *The Conqueror*, 166 U.S. 110, 125 (1897) (A14, A15). The Court of Appeals *applied the same and correct rule, citing the very same language* from *The Conqueror* (supra):

> " 'Demurrage will only be allowed when profits have actually been, or may be reasonably be supposed to have been lost, *and the amount of such profits is proven with reasonable certainty.*' " (A5) (emphasis added)

but nevertheless reversed, without presenting any reason or discussion as to why the District Court was not affirmed for failure of the ship to sustain its burden of proving the amount of any lost profits with reasonable certainty. It was perfectly obvious to both Courts below that plaintiff had not proven the amount of any additional alleged lost profit with any reasonable certainty, but had simply taken a shot at the moon, and had let the District Court worry about possibly picking some number out of a hat on some rationale left to the Courts to work out, together with the

work of weeding out the many "admitted errors" found by the District Court (A17). This is a far cry from whatever "reasonable certainty" has to mean; called for the District Court to engage in pure guesswork at best; and we submit that it should not do for the Second Circuit to cite a decision of this Court dealing with the standards of proving damages in anti-trust litigation (*Story Parchment Co.* v. *Paterson Co.,* 282 U.S. 555 (1931) (A6)) as being applicable or controlling on whether a plaintiff has proven its damage with the reasonable certainty required in a maritime tort case for lost profits when substantial lost profit has already been recovered. Compare: *W. L. Hailey & Co.* v. *The County of Niagara,* 388 F.2d 746, 753 (2d Cir. 1967) and *Shannon Shaffer Oil & Ref. Co.,* 51 F.2d 878 (10th Cir. 1931).

The failure of the ship to prove its alleged additional lost profit with reasonable certainty is highlighted by the Court of Appeals recognizing the "uncertainty" of the amount of any such damage (A6), and even noting that additional considerations of damage measurement, which the ship will no doubt oppose on any remand, may be relevant on remand, i.e. a consideration of *time* charter rates in the open market, since the ship's claim for alleged additional profit was presented on a *voyage* market basis for the time when the vessel was on a *time* charter (A7). Moreover, how, under any concept of logic or law, or "clearly erroneous" test, or any existing standard of review, could the ship be considered on appeal to have proven its damages below with the "reasonable certainty" required, when the ship's *sole* witness on loss of use *was not believed* by the District Court?

The demeanor and credibility of a witness is a matter uniquely within the province of the District Court trying a non-jury case. Matters that are controlled by credibility factors are and should be left undisturbed on appeal according to our system of appellate procedure.

Barry v. *U.S.,* 501 F.2d 578, 584 (6th Cir. 1974);

Holsapple v. *Woods,* 500 F.2d 49, 51 (7th Cir. 1974);
Marcum v. *U.S.,* 452 F.2d 36, 39 (5th Cir. 1971);
Metcalfe v. *Oswell Towing Co., Inc.,* 1969 A.M.C. 1801, 1803 (5th Cir. 1969);
Honchorck v. *Dravo Corp.,* 372 F.2d 92 (3rd Cir. 1967);
Broadcast Music v. *Havana Madrid Restaurant Corp.,* 175 F.2d 77, 80 (2d Cir. 1949);
Storley v. *Armour & Co.,* 107 F.2d 499, 510 (8th Cir. 1939).

The District Court's opinion cannot be read without concluding that the ship's claim for additional lost profits was in large part denied because of the demeanor and lack of credibility of the ship's sole witness on lost profits. The ship's entire case for additional lost profit was based upon the lengthy testimony and calculations of this one witness. As stated by the District Court "The plaintiff's case is almost wholly founded upon the very extended testimony of Mr. Hatgis" (A12). Mr. Hatgis testified on every presented factor involved in the additional lost profit claim, including the existence of a market during the extension period, the condition of the market, the probability that the ship would have been otherwise chartered in the extension period, etc. The decisions on when or how to charter the ship were made by someone aboard (by whom Mr. Hatgis did not know) who did not testify. Mr. Hatgis was the man whose job it was to supervise and oversee the prosecution of the claim for lost profits on behalf of the ship. He was found by the District Court to be "a highly interested witness" and from his "demeanor", and testimony, and calculations, the District Court's appraisal of him left

> ". . . his credibility and the weight and significance of his testimony severely impaired in my mind." (A12)

The Court of Appeals improperly disregarded the credibility factor, and did not mention it. To do so was error,

the nature and magnitude of which no commercial litigant should be subjected to, and was error that this Court should not permit to stand.

This Court, the lower federal courts, and litigants under our system of justice have a vital interest in litigation ending after the parties have had a fair day in court, which the ship has had, rather than requiring and/or becoming involved in another go-around (before a different judge) when the District Court's initial decision should have been affirmed on grounds clearly sufficient, correct, and not reversed by the Court of Appeals. This is especially so when the District Court decision was controlled in large part by the lack of credibility of the ship's sole witness on lost profits. To do otherwise is to reward the party who had dared to present an outrageous claim to the Court, lacking in credibility; and to punish a litigant who was willing to go to the effort and cost of defending the outrageous claim, and put its faith in the Courts' ability and willingness to appreciate and label for what it was, the lack of credibility and inequity in the case presented for remote alleged additional lost profit.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: New York, N. Y., October 29, 1976.

Respectfully submitted,

Louis P. Sheinbaum
99 John Street
New York N.Y. 10038
Counsel for Petitioners.

Geoffrey W. Gill
Bigham Englar Jones & Houston
Of Counsel

APPENDIX

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 806—September Term, 1975.

(Argued April 19, 1976 Decided August 6, 1976.)

Doocket No. 75-7627

COMPANIA PELINEON DE NAVEGACION, S.A.,

Plaintiff-Appellant,

—against—

TEXAS PETROLEUM COMPANY,

Defendant-Appellee.

Before:

HAYS and MANSFIELD, *Circuit Judges,*
and BRIEANT, *District Judge.*•

Appeal by plaintiff from a judgment following a non-jury trial in the Southern District of New York, George H. Boldt, *Judge,*•• which limited plaintiff's claim for damages for loss of use of its vessel to the existing daily time charter rate net of operating expenses and denied costs.

Affirmed in part, reversed in part and remanded for further proceedings.

• Of the Southern District of New York, sitting by designation.

•• A senior Judge of the Western District of Washington, sitting by designation.

JOSEPH C. SMITH, Esq., New York, N.Y. (Burlingham, Underwood & Lord, Robert J. Zapf, Esq., New York, N.Y., of counsel), *for Plaintiff-Appellant.*

LOUIS P. SHEINBAUM, Esq., New York, N.Y. (Bigham, Englar, Jones and Houston, Geoffrey W. Gill, Esq., New York, N.Y., of counsel), *for Defendant-Appellee.*

BRIEANT, *D.J.:*

Plaintiff-appellant, Compania Pelineon De Navegacion, S.A. ("Pelineon"), as owner of the chartered petroleum tanker S.S. CAPETAN MATHIOS ("the Mathios"), seeks to review a final judgment entered in the Southern District of New York upon oral decision and written findings following a bench trial. The trial court awarded plaintiff damages in the total amount of $75,258.05, including interest, arising out of loss of use of the vessel, and directed that each party bear its own costs.

On September 29, 1972 at Tumaco, Colombia, while under a long-term time charter to Gulf Oil Corporation ("Gulf") the Mathios was being maneuvered into a sea berth by a pilot employed by defendant-appellee Texas Petroleum Company. In part due to the negligence of Texaco employees, not disputed here, her propeller became fouled in the chain of a buoy marking the berth. As a result of this allision, the vessel suffered severe physical damage, also not in issue on this appeal.

In the days immediately following the allision, the vessel was examined at Tumaco by an American Bureau of Shipping ("ABS") surveyor who observed that, among other damage, the fair water cone was missing but nevertheless issued a certificate of seaworthiness on October 3, 1972. The Mathios resumed trading under the Gulf charter. A

new fair water cone was ordered with drydocking to be scheduled as soon as the needed repair part became available.

Soon after leaving Tumaco, the vessel experienced some vibration and operating difficulties. The owner and charterer agreed that a mutually convenient time to accomplish this yard repair would be in late March and early April, 1973. When the fair water cone became available, the Mathios entered drydock at Hoboken, New Jersey, on March 29, 1973, some four months prior to her next scheduled drydocking and overhaul, which had been originally planned following charter expiry.

In drydock, it was discovered for the first time that the vessel had been rendered unseaworthy by the occurrence at Tumaco. The needed repairs being accomplished, together with certain unrelated owner's repairs, the Mathios returned to the charterer's service on April 19, 1973.

On June 28, 1973, Gulf exercised its option under the charterparty to extend the charter by a period equal to all the off-hire time experienced by the Mathios during the charter. The off-hire extension included 25.179 days due to the aforementioned drydocking at Hoboken.

Between April and October, 1973, the market rates for voyage charters, and to a lesser extent for time charters, soared. On October 6, 1973, an Arab-Israeli was broke out. For a brief time thereafter, market rates remained high, but with the advent of oil embargoes by Mid-East oil producers, the demand for tankers fell sharply, along with the market rate for charter hire of tankers. The lower market rates began in the third week of October and remained depressed for some time thereafter.

The parties stipulated in the pre-trial order that the vessel

> "would have completed its charterparty commitment and all extensions, except that related to the Tumaco

casualty, by on or about October 30, 1973. The vessel came off charter after all extensions on November 24, 1973."

Assigned as error on this appeal are (A) denial of recovery for loss of profit in excess of the rate under the existing time charter for that period by which the charter term was extended as a result of the allision; (B) denial of recovery for four (4) days loss of profit out of the repair period, found by the trial court to be attributable to unrelated owner's work; and (C) denial of an award of costs to the prevailing party. We discuss these claims in the order listed.

(A) The trial court held Pelineon's damages for loss of the use of the vessel as a result of the Tumaco incident should be measured by the net profits lost under the charter-party in effect at that time, holding:

> "[P]laintiff in effect seeks to have defendant pay twice for a single wrong. The off-hire provision in the charterparty is a contractual provision between plaintiff and the charterer. Plaintiff well knew that any off-hire time could be added to the charter term, and that plaintiff would be paid at the agreed rate for any off-hire period added. Plaintiff's attempt to recover hypothetical profits from defendant over and above those amounts actually contracted and paid under the charterparty has never before been awarded in similar circumstances, and this Court finds and holds it to be inequitable under well accepted equitable principles in Admiralty."

Relying on *Skou* v. *United States,* 478 F.2d 343 (5th Cir. 1973) the court below held that the applicable measure of damages in determining lost profits is the charter rate less costs and expenses saved by the owner when the vessel was

not in active service under the charter. The court found that Pelineon earned $2,179.36 net profit per day under the charterparty, which had been entered into in September 1969, and extended by an addendum dated May 28, 1971, at a rate of $3.85 per deadweight ton per month.

The court found plaintiff's calculation of lost profits to be highly speculative and "based on questionable assumptions of unforeseeable facts."

In this we find error. Demurrage, loss of profits from loss of the use of a vessel, traditionally has been an item of damage in maritime tort law. However, "demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty." *The Conqueror,* 166 U.S. 110, 125 (1897).

In *Petition of Kinsman Transit Company,* 338 F.2d 708, 724 (2d Cir. 1964), *cert. denied sub. nom. Continental Grain Co.* v. *City of Buffalo,* 388 U.S. 944 (1965), this Court observed that

> "[t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct', and the damage, although other and greater than expectable, is of the same general sort that was risked."

Pelineon's damage here was plainly damage of the "same general sort that was risked."

Under the circumstances presented here, the magnitude of this damage, in addition to the fact of damage itself, was foreseeable. It was foreseeable that damage to the vessel would result in loss of use, and hence lost profits. It was also foreseeable that the vessel would be operating under time charter nearly complete as to term, with provision for off-hire extension. Ironically, the very charterparty agreement between Pelineon and Gulf was a form

contract, amended as to matters not relevant here, used by appellee's parent company, Texaco. It was also foreseeable that the off-hire extension provision would be invoked by the charterer only if it were commercially advantageous to do so. The off-hire extension provision would be advantageous to the charterer if, at the time the charterparty would otherwise have expired, the market price for tankers had risen.

It is clear that if defendant had not negligently caused the accident, necessitating drydock repair and the attendant delay and off-hire extension, Pelineon would have been able to earn additional profits during the time when the Gulf charter had to be extended at the old rate. We, therefore, reject the argument that these profits were too remote a consequence or too unforeseeable to be recoverable.

The uncertainty regarding the damages in this case is only as to their amount.

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 562 (1931).

It is not required that damages be proved with mathematical exactness provided that there is reasonable data from which the amount of damages can be ascertained with reasonable certainty, "and the party who has caused the loss may not insist on theoretical perfection." *Entis* v. *Atlantic Wire & Cable Corporation,* 335 F.2d 759, 763 (2d Cir. 1964).

We hold that plaintiff-appellant is entitled to recover its net damages representing the reasonable current market value of the loss of use of the Mathios for that portion of the drydock period attributable to repairs necessitated by the Tumaco allision, not limited by the Gulf time charter

rate. The amount of such damages must be determined on remand. For purposes of computing the amount on remand, we express no opinion at this time as to whether it is appropriate to assume, as appellant does, that upon the termination of the Gulf charter, the Mathios would of necessity be withdrawn from the long term time charter market, and become available for short term spot voyage charters, and therefore whether the relevant rate is that then prevailing for time or spot charters.

We believe that, upon this record, such profits may be determined without regard to any possible overlap period.[1] The stipulated facts previously quoted from the pre-trial order show that the parties have agreed as to the precise length of the extension caused by the period off-hire, and also the date on which the vessel would have come off charter but for the Tumaco casualty. Whatever allowance which would have to be made for underlap or overlap has been eliminated from the computation by the parties' agreement as to the exact date of redelivery to the owner but for the appellee's negligence.

(B) Plaintiff-appellant also disputes the disallowance by the trial court of four (4) days off-hire at the Hoboken drydock attributable to owner's repairs. As to the exclusion of this time in computing lost profits, the trial court was correct. After the Tumaco allision, the Mathios was found seaworthy by ABS although it was recommended that collision damage be reexamined at the next regular drydock period. The vessel continued her operations there-

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[1] Paragraph 8 of the charterparty provided in relevant part:

> "Notwithstanding the provisions of Clause 3 hereof [the Clause fixing the term], should the vessel be upon a voyage at expiry of the period of this charter, Charterer shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by this charter."

after. Awaiting a repair part, Pelineon scheduled drydocking for a time convenient to owner and charterer. The trial court found that this scheduling was planned so as to move ahead the next regularly scheduled drydock period by a few months. At the time that the drydocking was scheduled, Pelineon did not know that the vessel was in fact unseaworthy. Accordingly, the evidence justified the holding below that the vessel may recover lost profits only for that portion of the Hoboken repair period by which Tumaco collision repairs extended the time which the owner's routine repairs required. See *Skibbs A/S Dalfonn* v. *S/T Alabama,* 373 F.2d 101 (2d Cir. 1967); *The Pocahantas,* 109 F.2d 929, 931 (2d Cir.), *cert. denied sub. nom. Eagle Transport Co.* v. *United States,* 310 U.S. 641 (1940).

(C) Since no reason was given for denying appellant the ordinary taxable costs as the prevailing party below, we also reverse on this point.

While the trial court has discretion under Rule 54(d), F.R.Civ.P. to allow or disallow costs, such discretion is not to be exercised arbitrarily. *Trans World Airlines, Inc.* v. *Hughes,* 515 F.2d 173 (2d Cir. 1975), *cert. denied* —— U.S. —— (1976). Upon remand the district court may determine upon the present record or additional submissions whether appellant has done anything to deserve imposition of the penalty of denial of costs.

This action is remanded to recompute plaintiff-appellant's damage consistently with the foregoing, and ascertain whether costs should be allowed in the district court. In all other respects, the judgment appealed from is affirmed, with costs to appellant in this Court.

Since it appears that Judge Boldt is not designated or available in Southern District of New York at this time, our remand shall issue to the transferor Judge, Hon. Robert J. Ward, in accordance with local IAC Rule 12 of that district.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of August one thousand nine hundred and seventy-six.

Present:

HON. PAUL R. HAYS

HON. WALTER R. MANSFIELD
Circuit Judges

HON. CHARLES L. BRIEANT
District Judge

75-7627

Compania Pelineon De Navegacion, S.A.,

Plaintiff-Appellant,

v.

Texas Petroleum Company,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings with costs to be taxed against the appellee in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

Oral Decision of the District Court.

IN THE UNITED STATES DISTRICT COURT
Southern District of New York

73Civ4284
October 10, 1975

Compania Pelineon De Navegacion SA

versus

Texas Petroleum Company

Court's Oral Decision

Appearances:

For the Plaintiff
Joseph C. Smith
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25 Broadway
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Louis P. Sheinbaum and Geoffrey W. Gill
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99 John Street
New York, New York 10038

Before the Honorable George H. Boldt, Presiding

The Court: As I said at the close of the argument, I did not propose to prepare a full-scale and detailed opinion for posterity but only to summarize the essential and more significant facts and conclusions of law that I have reached in determining the case. I have spent a tremendous amount

of time on it. It is an interesting case, and I give my best to it.

It is my practice in stating the considerations upon which I have reviewed the case and upon which, in part at least, my decision lies by expressing my evaluation of witnesses. I do this directly and bluntly, and sometimes that is disagreeable to me. I don't think it will be in this instance. And it might be unpleasant to the hearer.

The plaintiff's case is almost wholly founded upon the very extended testimony of Mr. Hatgis. Undoubtedly, he is a man of very great experience in the chartering of vessels. He has a very sharp and keen intellect, and he applies those fine talents with diligence in the service of his employers. He was the one that made the estimates of the study upon which the plaintiff's claims for damages are founded. Quite understandably he is a very vigorous advocate for his owners and the people that he serves. And from his demeanor in the trial and from the content of his work in preparing the claim for damages, it is clear that he sought the utmost penny that, under any circumstances, anyone could conceive of. Indeed, sometimes he went even beyond that. In short, he was a highly interested witness and displayed no sense of balance or, to put it another way, fairness to the adverse party. The computation and all of his dissertations about them, which went on here at great length, primarily on cross, it seemed to me that he was reluctant to acknowledge anything that might favor the defendant.

Naturally, this appraisal of him, while very praiseworthy from his employer's point of view, leaves his credibility and the weight and significance of his testimony severely impaired, in my mind. It may be that his employers pressured him to pursue the matter in that way, but however it came about, it was not an impartial approach to a reasonable result.

Mr. Pillat, of course, was a very highly qualified man, and he impressed me with his integrity and responsibility. But there was some room for question concerning some of his opinions because he never did see the ship as it was to start with, and it was a week or such a matter later when he actually saw it at first, and by that time, some of the items had been removed, and so on. I don't pay a great deal of attention to that, but it is a factor that one evaluating a witness should note. And I noted it.

There was one other witness who testified. I can't remember his name now, but I have no special comment to make because I didn't see anything especially significant one way or another concerning that witness.

I am sure you will give me credit for having followed the evidence very closely at every point, and I think my occasional inquiries of the witness or counsel were at least reasonably intelligent inquiries and that they went to the significant matters. This, of course, is mostly a self serving declaration which, upon motion, perhaps, ought to be stricken. But I am trying to speak as forthrightly as I can to you gentlemen, both of whom—counsel, I am speaking of—have displayed the highest standards of our profession and which we have come to expect from experienced and able admiralty—I was going to say proctors, but I guess that is not right any more.

Now for my conclusions.

Pursuant to the stipulated pretrial order the issues for determination by the Court are stated as follows: This is the literal language in the pretrial order.

1. Was the Capetan Mathios unseaworthy at the time she left Tumaco and at the time she entered the repair yard in Hoboken, New Jersey in March, 1973?

2. Is plaintiff entitled to any recovery for loss of use, loss of time charter hire and/or loss of profit as a result

of the casualty; and if so, how much is plaintiff entitled to recover as provable damages?

Generally the measure of the economic loss of a vessel during detention is net profit. The terms and conditions of the charter party may be considered by the Court in determining the amount of lost profits. This is from Skou v. United States, 478 F. 2d 343 (5th Cir. 1973). It is also within the discretion of the Court to subtract from a gross charter amount costs and expenses saved by the owner when his vessel is not active under a charter.

In considering lost profits the inquiry is "not whether they could possibly have been made, but is whether they would have been made." In the North Star 151 F. 168, 175 (2d Cir. 1907). It is necessary to show that profits "have actually been or may reasonably supposed to have been lost." That is from the Supreme Court in The Conqueror, 166 U.S. 110, 125 (1897).

The Court, sitting in admiralty may apply equitable principles to matters within its jurisdiction and has wide latitude in choosing a damage standard and applying it. And that is from Gilmore and Black, The Law of Admiralty, (2d Ed 1975) Sl-14 p. 41; and is also stated in the United States Supreme Court decision p. 41; Brooklyn Eastern Terminal v. United States, 287 U.S. 170 (1932).

In Sinclair Refining Co. v. The American Sun, 188 F.2d 64 (2d Cir. 1951) another case in the circuit, the Court stated: "whatever the method employed (in calculating loss), it should be one that is reasonably adapted to the circumstances of each case so that there will, on the one hand, be no failure to award damages suffered and on the other, no unreasonable award based upon some theoretical concept of loss." That is 188 F.2d at 66-67, the Sinclair case. Reimbursement for detention is allowed where potential profits have been lost because of loss of use. Such potential loss cannot be speculative, but must be established with reasonable certainty. Again, The Conqueror is cited for that. 166 U.S. 110. Now, I turn to the three delay claims with which we are involved in this case. First The Tumaco Delay. The parties agree plaintiff should recover lost charter hire for the period that the Capetan Mathios was delayed in Tumaco for disengagement of a mooring chain from the propeller and a shipping survey and sea trials. Computation of the total recovery is stated in defendant's proposed Finding of Fact No. 29 and hereby is adopted.

Next, I turn to The Hoboken Delay, an abbreviated heading to indicate the subject matter. When a vessel is damaged and rendered unseaworthy, that is, unfit for sea voyage, through wrongful actions of another, the owner may recover dry docking and repair expenses. That is Atlantic Refining Company v. Matson Navigation Company, 150 F. Supp 516 (E.D. Pa. 1957). It is very pleasant to cite a district judge. In the present case, the full extent of the damages incurred in the Tumaco incident was not discovered until the vessel was placed in drydock in Hoboken, New Jersey on March 29, 1973. The Court finds the evidence insufficient to establish precisely when the vessel became unseaworthy; however, the Court finds that at some time prior to the drydocking referred to, the Tumaco casualty caused the Capetan Mathios to become unfit for sea voyage and therefore, in fact, unseaworthy.

The Court further finds that, in fact, the owners of the vessel did not know it was unseaworthy at the time it entered the drydock at Hoboken and did not put the vessel in drydock for the purpose of repairing unseaworthy conditions. While in drydock, substantial repairs, not chargeable to the Tumaco casualty, were made by the vessel owners. The time required therefor was estimated at four to seven days by a competent witness called by plaintiff. In the circumstances that (1) plaintiff long and unreason-

ably delayed in drydocking its vessel and (2) the unconvincing evidence purporting to show that both types of repair were made in the time required to make the unseaworthy repairs, the Court finds and holds that four days of the total repair time should be deducted in computing plaintiff's loss of profits during the drydock period at Hoboken.

For the periods plaintiff's vessel was in drydock at Hoboken, the most accurate measure of lost profits is the charter party terms themselves. There is no dispute that the figure $97,077.26 represents the total Tumaco related charter hire not paid by Gulf Oil as a result of off-hire provisions in the charter party. From that figure should be deducted the costs and expenses saved by plaintiff in not having the vessel in actual use. Counsel shall forthwith compute the amount of such saving and modify the amount of the Hoboken award accordingly. There was no showing that plaintiff's repairs effected at Hoboken extended the detention period beyond the time necessary to repair the Tumaco damage. Now I will speak of The Final Charter Extension Period.

Plaintiff's claim for lost profits due to the 25.179 days which were added to the Gulf charter and resulted in a later redelivery date than anticipated, is hereby denied for the following reasons:

Plaintiff in effect seeks to have defendant pay twice for a single wrong. The off-hire provision in the charter party is a contractual provision between plaintiff and the charterer. Plaintiff well knew that any off-hire time could be added to the charter term and that plaintiff would be paid at the agreed rate for any off-hire period added. Plaintiff's attempt to recover hypothetical profits from defendant over and above those amounts actually contracted and paid under the charter party has never before been awarded in similar circumstances and this Court finds

and holds it to be inequitable under well accepted equitable principles in Admiralty.

In addition and perhaps more significant, this Court finds plaintiff's proposed calculations for profits lost as a result of the charter term extension to be highly speculative, and have been based on questionable assumptions of unforeseeable facts, admitted errors and have not been established with reasonable or any certainty by the evidence. Further, market conditions prevailing during the claimed damage period were very extraordinary and uncertain making it difficult, if not impossible, to approximate profits with any degree of certainty. The Court has carefully reviewed each of the items of speculation and uncertainty enumerated at pages 31-32 of defendant's post trial brief. Upon full consideration thereof and the portions of the transcript supporting each item, the Court hereby finds and adopts all items as facts established by the evidence in this case. These are as follows:

1. The uncertainty of when, whether or how the charterer would exercise its option under clause 10.

2. The uncertainty of whether there would be any off-hire after the repair period which could also effect when the vessel would have gone back to owners "but for" the Tumaco casualty. In fact, there was an off-hire period after the repair period.

3. The uncertainty of when the vessel would have been returned, but for the Tumaco casualty under overlap/underlap and/or other actual and potential disputes between a charterer and owners.

4. The uncertainty of when the charters would have been fixed for any voyages after the vessel was so returned.

5. The uncertainty of what rate would be obtained.

6. The uncertainty of how much cargo would be loaded and finally,

7. The gross uncertainty of how long the assumed voyages would take given items such as weather, sea conditions, and so on. I fully subscribe to all of these and, indeed, think they are not exhaustive of other highly unpredictable matters that are an essential part of plaintiff's computation of what it might have made and go far from establishing what it would have made, which is the standard required by the law.

The awarding of interest is a matter within the Court's discretion. III Benedict on Admiralty, S 419 at 191. After full consideration the Court finds it equitable to award interest at the legal rate from March 29, 1973, to plaintiff on the awards for the Tumaco and Hoboken delays, computed on the foregoing ruling.

Each party will bear its own costs. Costs will not be allowed against either party.

I have run through the proposed findings of fact and conclusions of law proposed by both parties and have assembled a collection of them as adopted, if you wish to take these items down. Defendant's proposed Number 30 and 39 are not adopted. Defendant's No. 30 is adopted but altered to allow for the four days. 32 is altered to allow for the four day deduction I have spoken of in the decision. Plaintiff's proposed findings four and nine have been included, others not. In many particulars they are duplicitous, and in certain instances, they contain wording that I do not think sound proper and in accordance with my findings. Also, the conclusions of law offered by the plaintiff one, four, five, and six somewhat altered, and eight. A little later in the day, I will have these materials, including a copy of the transcript of the oral memorandum decision available for you, and I want you to have that much material because the form of judgment offered by the defendant, or proposed by the defendant—plaintiff did not offer a proposed form of judgment. I will use this form, but there are spaces therein fixing amounts and the like and other provisions that will either have to be altered or omitted, in keeping with the memorandum decision just pronounced. So if you gentlemen could come back at about 3:00 o'clock—and I think you said you could get back at 3:—

Mr. Sheinbaum: Yes.

Mr. Smith: Yes.

The Court: Then these materials will all be available and I want to finish the form of the judgment, in its final form. And I want to sign and enter it today, along with the findings of fact and conclusions of law. And copies of these documents, of course, will be available to you at that time.

The Court will now recess in this matter and proceed with the other matter.

(The Court thereupon recessed the above-entitled matter.)

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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1. In late September of 1972, plaintiff was the owner of the tanker CAPETAN MATHIOS. In the crude oil carrying trade in which she was engaged, the CAPETAN MATHIOS had a cargo carrying capacity of 29,100 long tons. Defendant, Texas Petroleum Company, operated a sea berth off the port of Tumaco, Colombia, South America. The berth consisted of a number of mooring buoys to which tankers were to be tied.

2. On September 29, 1972, the CAPETAN MATHIOS was being maneuvered into the berth by a pilot employed by defendant, when the propeller and propeller shaft of the tanker came into contact with the chain of one of the mooring buoys. The chain became wrapped around the propeller and propeller shaft.

3. During the several days immediately following the casualty, i.e. on September 30, October 1 and October 2, 1972, an American Bureau of Shipping surveyor (ABS being the vessel's classification society) examined the CAPETAN MATHIOS at Tumaco. At that time the mooring chain was unwrapped from the shaft and propeller of the vessel, and some damage was observed to the propeller blades and the propeller guard. The fair water cone was missing.

4. Sea trials were conducted for approximately 5 hours off Tumaco in order to check for vibration or for any damage to the propulsion system. The vessel appeared to be

operating normally. According to the ABS surveyor, the vessel was in satisfactory condition to proceed with her regular operations. Owners advised charterers that the vessel was seaworthy, could continue operations, and could fulfill charter commitments.

5. A Certificate of Seaworthiness was given to the vessel by the ABS, with the recommendation by ABS that the damage be reexamined at the next regular drydock period of the vessel. The vessel left Tumaco and continued to operate.

6. Prior to the casualty of September 29, 1972, the vessel owner intended to drydock the CAPETAN MATHIOS in the summer of 1973.

7. At the time of the casualty of September 29, 1972, the CAPETAN MATHIOS was operating under a time charter to Gulf Oil Corporation. The charter agreement was between plaintiff herein, as owner, and Gulf Oil Corporation, as time charterer. The charter agreement was dated 19 September, 1969 and was for a period of 18 months, "14 days more or less". The tanker started operating under the time charter on or about 18 January 1970. By an addendum dated May 28, 1971, the charter term or period was extended for a period of two years, "one month more or less", so that the vessel was to remain under time charter to Gulf Oil Corporation until on or about August 24, 1973, "one month more or less", at the charterer's option.

8. The terms of the time charter agreement, as negotiated by or on behalf of the plaintiff herein and Gulf Oil Corporation, included a provision that at the option of the charterer (Gulf Oil Corporation) any time during which the vessel was "off-hire" during the charter period could be added to the term or period of the charter.

9. From the time of the casualty at Tumaco, in late September of 1972, to March 29, 1973, the CAPETAN MATHIOS properly performed, and was operated, under the above time charter to Gulf Oil Corporation, with no reduction of speed. No speed claim was ever made against plaintiff by the charterer for the latter period.

10. At the time of survey at Tumaco, the vessel had been tipped so that the surveyor in attendance could examine the damaged propeller area. None of the items of damage noted or observed at Tumaco made the vessel unseaworthy.

11. A new fair water cone was sent from Europe and was ready for installation in New York in early or mid-January 1973. The owners and charterer conferred and decided that a mutually convenient time to put the vessel into a repair yard would be late March and early April 1973. Thus, the owners slightly moved ahead the previously planned yard or drydock period of the vessel, and intended to take advantage of said drydock period to repair the damage sustained at Tumaco.

12. The vessel went into a repair yard in the New York area on March 29, 1973 for what was thought would be an off-hire and repair period of about one week. The vessel did not go into the yard in March 1973 because of any known unseaworthy condition. The vessel did not return to drydock in the summer of 1973.

13. After the vessel went into drydock, the propeller, tail shaft and associated equipment were examined. It was found that much more damage than originally observed, most if not all of it internal, had been sustained at Tumaco. All the damage found was repaired.

13(a) The damage found at Hoboken consisted of damage to the tailshaft keyway and a kink or bend in the tail shaft and the three dowel pins connecting the inner geared ring of the low-pressure turbine flexible coupling were completely sheared. The force of the impact caused the quill shaft to rotate within the flexible coupling flange approximately one-third of a turn (Tr. 112, 113, 118-119, 120; Pl. Exhs. 9, 10, 10a, 11, 26, 27, 28, 31). Had the vessel continued to operate in its damaged condition, it was possible there could have been complete slippage of the shaft and a disaster could have occurred, as a result of overspeeding of the turbine (Tr. 120-121). All the damage discovered resulted from the casualty which occurred at Tumaco on September 29, 1972 (P.T.O., p. 3; Pl. Exh. 11, p. 16; Pl. Exh. 26, p. 16).

14. Owner's work while in the yard consisted of (1) cleaning the vessel's bottom and underwater hull, applying two coats of paint to same, and also applying a coat of anti-fouling paint; and (2) effecting repairs to a boom and sea chest strainer equipment which was taken from the vessel, repaired in the yard's shops, and returned and reinstalled on the ship. In addition, several classification surveys that did not require a drydocking were accomplished, and the owners also took advantage of the drydocking to accomplish a classification survey due in 1974 that did require drydocking. This meant that the vessel did not have to go into drydock for classification purposes in 1974, and had until 1975 to go into drydock for classification purposes upon leaving the New York yard in April of 1973. All of the latter work was not attributable to the Tumaco casualty.

15. If the above owner's work had been done alone, it would have taken about four days to one week to accomplish.

16. The vessel came off hire under the above charter party for the entire time while she was in the New York repair yard, for a period of 22 days, 22 hours and 52 minutes.

17. The vessel came off hire at Tumaco during the delay caused at Tumaco by reason of the casualty of September 29, 1972, for a period of 2 days, 5 hours and 25 minutes.

18. Gulf Oil Corporation withheld and did not pay plaintiff the charter hire for the above periods of time which total 25 days, 4 hours and 17 minutes, or 25.179 days. The amount of time charter hire not paid was $97,077.26.

19. After all repairs were completed, on or about April 19, 1973, the CAPETAN MATHIOS resumed operating under the above time charter with Gulf Oil Corporation.

20. In June of 1973 Gulf Oil Corporation exercised its option to extend the charter period by the "one month more or less" and by all the off-hire time experienced by the vessel during the two year "one month more or less" period. With some minor reduction, after some negotiation, the owner of the vessel accepted the length of the off-hire alleged by Gulf Oil Corporation, which included an alleged period of 25.179 days due to the Tumaco casualty. This amounted to an extension of the charter period from August 24 to on or about September 24, 1973, plus an additional period of 64 days, 0 hours, and 21 minutes. During the approximate 64 day extension, the vessel was in use, and plaintiff herein continued to receive charter hire from Gulf Oil Corporation at the agreed charter rate set forth in the above time charter agreement. Of the above 64 day extension period, only 25.179 days related to off-

hire connected with the Tumaco casualty. Thus, 38 days, 20 hours, 4 minutes of the extended charter period related to off-hire time wholly unconnected to the casualty at Tumaco, and there was a period of off-hire in the 38 day amount that related to an incident occurring after the repair period of the vessel in March/April 1973.

21. The CAPETAN MATHIOS concluded the time charter with Gulf Oil Corporation and was redelivered to plaintiff on November 25, 1973 at 2020 hours.

22. Between the yard period of March/April 1973 and September and October of 1973, the charter market for tankers experienced a rise unprecedented in recent years. The Arab/Israeli war broke out on October 6, 1973. The market remained high for a short time after October 6, but with the cut in crude oil production, and oil embargoes, by various mid-east oil producers that shortly followed, the demand for tankers fell sharply, together with the charter market rate for tankers. The sharp drop in tanker rates started in approximately the last third of October and continued thereafter.

22(a). Between the time repairs were made to CAPETAN MATHIOS in April 1973 until October 1973, the charter market for voyage charters from the Caribbean to Atlantic Coast United States ports increased from World Scale 260 in mid-June, 1973 to 450-500 in October, 1973, an increase in tanker rates of 300 to 350 per cent (Tr. 14, 20-21, 26, 173-174; Pl. Exh. 12, p. 5; Pl. Exh. 13). The rates declined in the latter part of October and early November to World Scale 300-350 (Tr. 216-217; Pl. Exh. 13).

23. Plaintiff and defendant have settled the liability issue in this action. Under the settlement plaintiff was and is to receive 80% of all its provable damages. Plain-

tiff's damages were alleged to be in two basic categories:

1) Hull and engine damage to the vessel owned by the plaintiff.

2) Loss of use and/or loss of time charter hire and/or loss profit.

Plaintiff and defendant settled the question of the quantum of damage sustained by the plaintiff by reason of the hull and engine damage sustained by plaintiff's vessel. Defendant paid plaintiff $180,090.00, i.e. the total amount agreed owed by defendant for the latter damages under the settlement agreement.

24. Thus, the issues for the Court to determine are:

1) Was the plaintiff's vessel, the CAPETAN MATHIOS, unseaworthy when her hull and engine damage was repaired in the New York area in March and April, 1973.

2) Is plaintiff entitled to any recovery for loss of use and/or loss of charter hire and/or lost profit, and if so—how much of a recovery is plaintiff entitled to in order to apply the above settlement percentage thereto.

If the Court finds plaintiff is entitled to some recovery for loss of use and/or loss of charter hire and/or lost profit, implicit in issue (2) is another question, i.e. what is the proper measure of damage to be applied.

25. In addition, under the settlement agreement it was agreed that this Court should determine whether plaintiff should be awarded any and/or what interest on any amount determined by the Court to be owed to plaintiff under the 80% settlement for loss of use and/or loss of charter hire and/or lost profit.

26. Subsequent to coming off the time charter with Gulf Oil Corporation in late November of 1973, the CAPETAN MATHIOS was placed into the voyage market, and was operated under voyage charters at least up to August of 1974 for various charterers.

27. Plaintiff claims loss of use, lost charter hire or lost profit for three periods: (1) the delay at Tumaco in late September and early October 1972; (2) the repair period in March/April 1973; and (3) 25.179 days of the time charter extension in late October and/or November 1973, claiming that with respect to the last period, the tanker could have been chartered out at a more profitable rate under voyage charters, as compared to the rate under the time charter with Gulf Oil Corporation.

28. The owners of the CAPETAN MATHIOS earned $2,179.36 net profit per day under the time charter with Gulf Oil Corporation. Plaintiff claims lost profit during the time charter extension due to off-hire, related to the Tumaco casualty, in the amount of $303,297.05, in addition to the claim to recover the above $97,077.26 charter hire not paid by Gulf Oil Corporation by reason of the delay at Tumaco and the repair period in March/April 1973.

29. For the period of delay at Tumaco in late September and early October, the plaintiff is entitled to loss of use measured by the rate of the time charter hire plaintiff was not paid for two days, 5 hours and 25 minutes. Since Plaintiff was entitled to hire of $97,077.26 for 25.179 days under the time charter party, for 2 days, 5 hours and 25 minutes (2.226 days) plaintiff's provable damages for loss of use are 2.226 x $97,077.26 or $8,582.31.

25.179

30. In addition, under the above facts, the vessel owner is entitled to recover for loss of use only for that portion of the repair period that Tumaco related repairs extended the time within which owner's work would have taken. See the above cited authorities, and see *Moore McCormack Lines* v. *S.S. Camden*, 244 F.2d 198 (2d Cir. 1957), cert. den. 355 U.S. 822 (1957); *The Cape Araxos*, 348 F.2d 33 (3rd Cir. 1965); *The Alabama/Dalfonn, supra,* and *Pan American Petroleum Company* v. *U.S., supra.*

31. The repair period in March/April 1973 was 22 days, 22 hours and 52 minutes. Since owner's repairs took or would have taken 4 days, the provable damages of plaintiff, for loss of use during the repair period, measured by the time charter rate, are 18.953/25.179 x 97,077.26 or $73,099.18.

32. The oral memorandum decision of the Court rendered in open court October 10, 1975 by this reference is hereby made a part of the Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

32(a). This Court has jurisdiction of the parties and the subject matter of this action is a maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. 28 U.S.C. §1333.

33. Under the facts of this case, plaintiff is not entitled to any alleged loss of profit or loss of charter hire for any part of the extension period. The proper measure of damage to be applied is the charter rate in the time charter that the CAPETAN MATHIOS was operating under at the time of the casualty and the delay at Tumaco, and the repair period. *The El Monte*, 252 Fed. 59 (5th Cir. 1918), cert. den.

248 U.S. 573 (1918); *Sabine Transportation Co.* v. *S.S. Esso Utica*, 1955, (A.M.C. 2102 E.D. Texas 1955); *The Agwidale*, 61 F. Supp. 191 (S.D.N.Y. 1945), aff'd 153, F.2d 869 (2d Cir. 1946), cert. den. 328 U.S. 835 (1946); *Quevilly-Sampson*, 1938 A.M.C. 347 (S.D.N.Y.); *The Bergenland*, 36 Fed. 504 (S.D.N.Y.); *The Soya*, 1956, 1 Lloyd's List Law Reports 557 (Court of Appeal).

34. The loss of profit allegedly sustained by plaintiff in the extension period of the time charter was too unforeseeable, remote and speculative to properly be considered as consequential damages recoverable in this tort action. Moreover, plaintiff has not proven any such damage with the reasonable certainty required in a case where a party is seeking a recovery for lost profit.

35. The remote, unforeseeable and speculative nature of the claim for lost profit during the extension period may be seen by considering the following:

(a) The very existence of the off-hire extension option in the time charter was a matter of negotiation between the charterer and owner.

(b) It would not have been unusual for the above clause to have been stricken during the negotiations, and not be a condition under which the vessel was chartered. In addition it has not been shown that defendant had any idea of what kind of charter the tanker was being operated under and it could have been under a voyage charter or even a bareboat charter for all anyone knew or anticipated.

(c) It was always uncertain, up to late June of 1973, when the charterer exercised its option, as to whether, when or how the charterer would exercise its option.

(d) The rise in the market between April 1973 and September and October of 1973 was unprecedented in recent years.

(e) The amount of off-hire to be added to the time charter period was a matter to be evaluated and presented by the charterer, and considered and evaluated by the owner, with any differences to be negotiated out between the two. In addition, off-hire occurring even after the repair period could have effected the time the owner got back his vessel after an off-hire extension, as it did.

(f) The time when the vessel should or would have come back to the owner but for the Tumaco casualty is most speculative, given problems of over-lap/underlap under the law and chartering practice, any disputes that might have resulted, and a dispute that actually did take place at the end of the time charter in question in late November of 1973.

(g) There were great fluctuations, and much instability in the voyage world scale rate from day to day, or even within the same day, around the time when the owners might have gotten the vessel back, but for the Tumaco casualty.

(h) Applying a "but for" test to see how the Tumaco casualty effected the subsequent chartering history and/or economic loss or gain of the owner might require following the history of the vessel to the end of its service or career for the plaintiff. See *The Soya,* 1956 Lloyd's List Law Reports 557.

(i) The gross uncertainties as to what world scale rates, what ports, how much cargo, how much

bunkers would have cost, and how long the voyages of the vessel would have been, if voyage charters were made by the vessel during the extension period.

36. It is also possible that had the Tumaco casualty not occurred, and the vessel had come back to her owners earlier, an offer for a time charter would have been made that the owners might have accepted, rather than put the vessel into the more risky voyage or spot market trade.

37. Under the facts of this case the "actual loss" of the plaintiff cannot be considered to include any alleged loss profit during the extension period, and no such "actual loss" has been proven to the satisfaction of the Court. *The Conqueror,* 166 U.S. 11 (1897), and *The North Star,* 151 Fed. 168 (2d Cir. 1907).

37(a). Plaintiff was under a nondelegable duty to exercise due diligence to make his vessel seaworthy. 46 U.S.C. § 1304(1); 46 U.S.C. §§ 181 et seq. *Federazione Italiana D.C.A.* v. *Mandask Compania de Vapores,* (S.D.N.Y. 1966) 284 F. Supp. 356 aff'd in part, rev's'd in part (2 Cir. 1968), 388 F.2d 434, cert. denied 393 U.S. 828 (1968); *John Penny & Sons, Limited* v. *M/V Swivel,* (D. Mass., 1967), 266 F. Supp. 302.

37(b). When a vessel has a certificate of seaworthiness from the American Bureau of Shipping or other authorized agency that of itself does not establish that the vessel is seaworthy. In *Re Marine Sulphur Queen,* (2 Cir., 1972) 460 F.2d 89, cert. denied 409 U.S. 982 (1972); *Federazione Italiana D.C.A.* v. *Mandask Compania de Vapores, supra*; *Frederick Snare Corp.* v. *Moran Towing & Transportation Co.,* (S.D.N.Y. 1961) 195 F. Supp. 639; *States Steamship*

Co. v. *United States,* (9 Cir., 1957), 259 F.2d 458, cert. denied 358 U.S. 933 (1959), reh. den. 359 U.S. 921 (1959).

37(c). The plaintiff was under a duty to investigate the extent of the damage sustained in the Tumaco casualty, and exercise due diligence to ensure the seaworthiness of the vessel until it drydocked CAPETAN MATHIOS in March/April, 1973. *Great Atlantic & Pacific Tea Co.* v. *Brasileiro,* (2 Cir., 1947), 159 F.2d 661, cert. den. 331 U.S. 836 (1947); *Waterman Steamship Corp* v. *The Gay Cottons,* (9 Cir., 1969), 414 F.2d 724; *Avera* v. *Florida Towing Corporation,* (5 Cir., 1963), 322 F.2d 155.

37(d). The measure of damages and computation must vary with the facts of each case to fulfill the purposes of compensatory awards and the doctrine of *restitutio in integrum. Brooklyn Eastern Terminal* v. *United States,* 287 U.S. 170 (1932); *The Potomac,* 105 U.S. 630 (1881); *Moore McCormack Lines, Inc.* v. *The Esso Camden,* (2 Cir., 1957), 244 F.2d 198, cert. denied, 355 U.S. 822 (1957); *The Gylfe* v. *The Trujillo,* (2 Cir., 1954), 209 F.2d 386; *Sinclair Refining Co.* v. *The American Sun,* (2 Cir., 1951), 188 F.2d 64; *The Hygrade No. 24* v. *The Dynamic,* (2 Cir., 1956), 233 F.2d 444.

38. Under the above settlement agreement plaintiff is entitled to 80% of its above provable damages.

39. Judgment is to be entered in accordance with the above, and the 80% settlement agreement between the parties.

GEORGE H. BOLDT
U.S.D.J.

October 10, 1975.

IN THE

Supreme Court of the United States

No. 76-628

TEXAS PETROLEUM COMPANY,

Petitioner,

— against —

COMPANIA PELINEON DE NAVEGACION, S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion in the United States Court of Appeals for the Second Circuit was handed down on August 6, 1976 and is now officially reported at 540 F.2d 53.

The opinion of the District Court is not officially reported but is set forth in the Appendix to the Petition for a Writ of Certiorari herein. (A 11 *et seq.*).

Jurisdiction

This Court has jurisdiction as set forth in the Petition.

Question Presented

There is no fundamental principle of law which requires review and those principles applied by the Court of Appeals are well established in maritime law and the law of damages.

ARGUMENT

The decision of the court below is correct on the application of well-established principles of law to the facts of this case and is not in conflict with the decisions of other courts of law.

The Court of Appeals, applying well-established principles of law, corrected the errors in the District Court judgment. There is no conflict with the decisions of this Court or other courts nor is there any issue of special or crucial importance presented. The Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." U.S. Sup. Ct. Rule 19, 28 U.S.C.A.; *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955).

The Court of Appeals for the Second Circuit recognized that:

> "Demurrage, loss of profits from loss of the use of a vessel, traditionally has been an item of damage in maritime tort law." (540 F. 2d. at 55; A5).

See *The Conqueror,* 166 U.S. 110, 125 (1897). The principle is one of *restitutio in integrum,* to place the injured party in the same position he would have been in had the casualty not occurred.

Citing its prior decision in *Petition of Kinsman Transit Company,* 338 F. 2d 708 (2 Cir. 1964), *cert. denied* sub nom. *Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965), the Court of Appeals held that the loss of profits sustained by respondent in the period of the charter extension attributed to this casualty was foreseeable, and not remote or speculative. The District Court in ruling to the contrary was in error on the law.

This decision was completely in accord with prior decisions in the Second Circuit. *Petition of Kinsman Transit Company,* 388 F. 2d 821 (2 Cir. 1968), (*Kinsman II*), is clearly distinguished on its facts. There the Court ruled that a third party, far removed from the tort-feasors therein, who suffered a loss by reason of a contractual relationship with a fourth party, even further removed from the tort-feasors, could not recover for the damages suffered because such damages were too remote and indirect from the casualty. 388 F. 2d at 825.

The case before this Court on the petition for certiorari involves a casualty to the ship owned by respondent and operating under a time charter. The casualty was caused by

petitioner. It was clearly foreseeable that the owner of the ship would suffer damages from loss of use of the ship. This included the profits which respondent could have earned during the extension of the charter term attributed to the casualty had respondent been able to operate the ship for its own account. It is a well-established principle of tort law that:

> "... the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent suceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated. See Prosser, Torts, 260." *Petition of Kinsman Transit Company,* supra, 338 F. 2d. at 724.

As stated in Hart and Honoré, *Causation In the Law,* 1967:

> "Similarly it is settled law that the owners of a ship damaged through defendant's negligence can recover damages on the basis of the actual contract or charter on which she is engaged. This appears to be the case even if the contract contains onerous clauses which make the owners exceptionally vulnerable to delay." (at p. 163).

See also, Harper & James, *The Law of Torts,* Vol. 2, § 20, p. 1147 (1956).

The Court of Appeals correctly applied well-established principles of law regarding foreseeability in reversing the District Court.

The decision below is not in conflict with the decisions of this Court. In *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927) this Court ruled that a time charterer (a third party) could not recover lost profits from loss of use of a chartered vessel damaged by the tort-feasor because the charterer had no property interest in the vessel.

The respondent herein is the owner of the vessel and has the necessary property interest to sustain the right to recover the damages he has incurred from the loss of use of his vessel as a result of the casualty for which petitioner is responsible. The law of *Robins Dry Dock & Repair Co.* v. *Flint, supra,* should not be applied in this case.

The decision below is not in conflict with decisions in other Circuits, nor has petitioner argued that it is. Indeed, in *Skou* v. *United States,* 526 F. 2d 293 (5 Cir. 1976) the Court of Appeals for the Fifth Circuit recently ruled that the shipowner was entitled to recover his loss of profits on facts similar to those in this case. There a ship was off the market for future charters as a result of a casualty.

The decision of the Court of Appeals is not in conflict with the English case of *The Soya,* [1956] 1 Lloyd's Law Reports 557 (Court of Appeal) as stated by petitioner. That case involved a *voyage* charter. In this country, courts apply the "three voyage rule" in determining damages for loss of use of a ship where voyage charters are involved. See, e.g., *Moore-McCormack Lines, Inc.* v. *The Esso Camden,* 244 F. 2d 198 (2 Cir. 1957), *cert. denied* 355 U.S. 822 (1957); *The Tremont,* 161 Fed. 1 (9 Cir. 1908); *The Bulgaria,* 83 Fed. 312 (N.D.N.Y. 1897); *The Nyland,* 164 F. Supp. 741 (D. Md. 1958). The case before the Court on this petition involves a *time* charter, not a voyage charter. Therefore, even if the rule of the English courts as stated the *The Soya,* supra, were followed by our Courts, which it is not, it would not apply in this case.

The District Court erred in denying respondent's claim for damages on the ground that the damages were uncertain. The Court of Appeals in reversing on this point recognized that:

"The uncertainty regarding the damages in this case is only as to their amount." (540 F. 2d. at 55; A6).

The rule regarding certainty of damages was set forth by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931):

"The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (at p. 562).

This rule was correctly applied by the Court below to remedy the error of the District Court. (540 F.2d at 56; A6). See also, *Crichfield* v. *Julia,* 147 Fed. 65 at 71 (2 Cir. 1906).

The petitioner's assertion (Petition, p. 15) that the "clearly erroneous" rule was violated is wrong. The legal conclusions of the District Court on the issues of foreseeability, remoteness and certainty of damages are not binding upon the Court reviewing those conclusions on appeal. The District Court's mixed ultimate conclusions and conclusions of law (A20 to A32) were based upon an erroneous view of law that uncertainty as to the extent of damages relieves a party liable for the fact of damages. The inapplicability of the "clearly erroneous" rule is succinctly stated by the Fifth Circuit in *Skou* v. *United States,* supra:

"As stated by this Court in *Galena Oaks Corp.* v. *Scofield,* 218 F. 2d 217 (5th Cir. 1954), and cited many times since:

'Insofar, however, as the so-called "ultimate fact" is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is "subject to review free

of the restraining impact of the so-called 'clearly erroneous' rule."' 218 F. 2d. at p. 219, citing *Lehmann* v. *Acheson,* 3rd. Cir., 206 F. 2d. 592, 594." (526 F. 2d. at 295).

This Court in *Layne & Bowler Corp.* v. *Western Wells Works, Inc.,* 261 U.S. 387 (1923) held that the writ of certiorari should not be granted:

". . . except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." (p. 393)

Here, while the issues involved are of great interest to the parties, no fundamental principles can be established by review in this Court, where the application of the law involved varies with the facts of each case. In *Brooklyn Eastern District Terminal* v. *United States,* 287 U.S. 170 (1932), this Court recognized that the facts of each case will control the measure of damages used to make the injured party whole. This Court held:

"Only when thus enlightened can we choose the yardstick most nicely adjusted to be a measure of reparation, in some instances, no doubt, the hire of another vessel, in other instances, it may be, a return upon the idle capital . . . in others something else." (at p. 174)

The Court of Appeals for the Second Circuit applied that principle in *Sinclair Refining Co.* v. *The America Sun,* 188 F.2d 64 (2 Cir. 1951):

"Whatever the method employed, it should be one that is reasonably adapted to the circumstances of each case so that there will, on the one hand, be no failure to award damages suffered and, on the other, no unreasonable award based upon some theoretical concept of loss." (at p. 66)

Essentially, petitioner seeks another opportunity to present its case for consideration. This Court has held:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*" *Magnum Import Co., Inc.* v. *Coty*, 262 U.S. 159, 163 (1923) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied as no issues of importance to the public are presented and there is no conflict between the decision below and those of other courts.

Dated: New York, New York
November 29, 1976

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